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IN THE

Supreme Court of the United States

October Term, 1952
No. 205.

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and THE CALIFORNIA ELECTRIC POWER COMPANY,

Respondents.

BRIEF FOR RESPONDENT, CALIFORNIA ELECTRIC POWER COMPANY.

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ARGUMENT.

I.

This Case Presents No Justiciable Controversy, for, Even if California Commission Had No Jurisdiction to Issue Decision 45913, Navy Was Not Harmed Thereby, nor Would the Reversal of That Decision Benefit Navy in Any Way.

The opposite would be true if other than a governmental agency were the consumer, for then the rate fixed by California Commission would be the rate and the only rate, maximum and minimum, which Power Company could charge. But, as stated by California Commission in Decision 45913 [R. 12]:

> "* * *. electric rates prescribed by our Commission are not the rates which a utility must charge an arm of the United States Government. The Commission in 1942 issued General Order No. 96, which provides in Section X-B, that an electric utility may furnish electric service 'at free or reduced rates or under conditions otherwise departing from its filed tariff schedules to the United States and to its departments.' (See Public Utilities Act, Section 17.)"

This principle is observed in the Order [R. 19] where it is ordered that, as to Navy, the Company is *authorized* to charge and collect the rates set forth in Schedule P-2, but as to another customer, Mineral County Power System, the Company is *authorized and directed* to charge and collect the rates set forth in Schedule P-3.

Hence, the Order is permissive only and does no more than provide a ceiling above which Power Company cannot go. Obviously, what Navy objects to is, not that California Commission fixed a ceiling, but that *it raised the ceiling formerly existing.* Undoubtedly Navy would not object if the California Commission should *restore the old and lower ceiling rate.* So it is really not objecting to the jurisdiction of the California Commission, but to the way the jurisdiction was exercised. The reversal of Decision 45913, without more, would only remove the ceiling rate and not benefit Navy in any way. Decision 45913 left Navy completely free to negotiate as low a rate as it could and purported to limit only the Company. Decision 45913 placed no burden on commerce, and had no effect upon Navy. The objection now raised by Navy seems to be aroused by, and directed solely at the opinion of the California Commission expressed in Decision 45913 to the effect that it had jurisdiction over Power Company's rates to Navy. But even though the expression of this opinion might be distasteful to Navy, it has not affected Navy's rights in any way and is not a matter for legal relief.

II.

Neither the Attorney General, Solicitor General, Navy Department, nor Counsel Therefor Have Any Authority to Maintain This Action or Review for the Purpose or Effect of Transferring the Negotiating and Contracting Powers of the Navy Department in the Procurement of Electric Power to the Rate Fixing Jurisdiction of FPC, an Independent Establishment.

At present Navy has complete and unrestricted power to negotiate with Power Company or anyone else for any electric energy which it may wish to purchase at the best price obtainable, which, as to Company, may be any rate at or below the P-2 Schedule authorized by California Commission, the rate orders of said Commission fixing only a maximum for the rate charged governmental agencies [R. 12]. Whether or not that is a desirable or advantageous or economic position or method, is not for the Navy Department or the Department of Justice to decide, for it is the situation which has been provided by Congress.

There is no authority for any of the moving parties in this proceeding to maintain it for the purpose of surrendering any portion of the Navy Department's autonomy into the hands of FPC, which is an agency never contemplated by Congress as having control of the Navy's contracting for supplies of any kind. Any rate fixed by FPC would, under the provisions of Section 205, be both the maximum and minimum, for, under paragraph (c) of that section, no discrimination by deviation therefrom would be allowed. Thus, Navy would have completely surrendered to FPC its power to conduct and control that

part of its affairs, without the knowledge or consent of Congress.

It may assist in appreciating the importance of this point to ask the question: Why does Navy so diligently prosecute this litigation for the general end and purpose that jurisdiction to fix the rate at which Navy purchases energy shall be vested in FPC? It certainly cannot be mere academic interest in pursuing some ideal about rate regulation. There must be some purpose of more pecuniary character or more directly related to Navy's affairs. Is it the expectation or hope that FPC will fix a lower rate than the ceiling rate named by California Commission and is that anticipated for only the immediate present or is it supposed to be a permanent condition? If some assurance existed that one regulatory agency will always be lower or higher than another in fixing a rate, one or the other must proceed on a prejudiced, arbitrary, non-judicial, and false basis, for a just, fair, reasonable, non-discriminatory rate ought to be approximately the same in the language of any regulatory commission and it ought not to be affected by the favoritism of a Federal commission for a Federal consumer or of a State commission for a State consumer.

While FPC and its counsel might be here simply and only to protect what they regard as FPC jurisdiction, the interest of the Department of the Navy and the Department of Justice must be fired by some different motive. But there is no statutory authority for their efforts to surrender the contracting autonomy of the Navy Department to FPC, and, if they succeed, yet are disappointed in procuring lower rates at the hands of FPC, will Navy not then want to retract?

III.

History and Analysis of Federal Water Power Act, Also Called Federal Power Act.

Introductory to the presentation of our Points IV and V intended to show that Power Company's deliveries to Navy are, under the facts of this case, subject to regulation solely by State Commission or Commissions and that, independently of that ground, Company's deliveries to Navy are not subject to regulation by FPC under Part II of the Act, it seems necessary first to call attention briefly to some of the background and history of the present legislation on which this case turns.

The Act with which we have to do was not, as some seem to suppose, a new Act of 1935, to which the old Federal Water Power Act of 1920 was prefixed as Part I and as a historical relic or subordinate part to be overshadowed by Parts II and III. On the contrary, what is called *Federal Power Act* is the *Federal Water Power Act,* approved June 10, 1920 (41 Stat. 1063), as amended and extended in 1935. Not only is this demonstrated by the language of the enactment of 1935, but the whole act is still classified for codification under the division of the U. S. Code (Title 16) devoted to "Conservation," and not under "Commerce" (Title 15) as is the Natural Gas Act, which corresponds to Part II of the Water Power Act.

The *Public Utility Act,* approved August 26, 1935 (49 Stat. 838) provided in part:

> "Sec. 212. Sections 1 to 29, inclusive, of the *Federal Water Power Act,* as amended, shall constitute Part I of *that* act, and Sections 25 and 30 of such Act, as amended, are repealed; Provided, That nothing in *that* Act, as amended shall be construed to re-

peal or amend the provisions of the amendment to the Federal Water Power Act approved March 3, 1931 (41 Stat. 1353) or the provisions of any other Act relating to national parks and national monuments.

"Sec. 213. *The Federal Water Power Act,* as amended, is further *amended by adding thereto the following parts:*" (Emphasis supplied.)

(Then follow Parts II and III.)

So, what is called *Federal Power Act* is technically and in reality the *Federal Water Power Act of 1920,* amended in some particulars in the former text and further amended by adding thereto Parts II and III. The name "Federal Power Act" is merely a short title authorized by Section 320, the final Section of the Federal Water Power Act.

(a) Right of Way Acts.

Part I of the Act is essentially the same (with amendments not material in this case) as the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), which in turn emerged out of prior practices in the Departments of Interior and Agriculture under the Right of Way Act of February 15, 1901 (31 Stat. 790). That Act authorized the Secretary of the Interior, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forests and other reservations for electrical plants, poles, and lines and for the generation and distribution of electrical power and other purposes, provided, that such permission might be revoked by the Secretary or his successor at any time and should not be deemed to confer any right or easement or interest in, to, or over any public land, reservation or park.

For twenty years, the Act of 1901 relating to both plants and lines, supplemented by the Act of March 4, 1911 (36 Stat. 1253), relating only to lines, afforded the only means of access to the public lands for electrical developments.

The conservation movement, which had begun earlier and which had succeeded in the establishment of the National Forest Reserves (Act, March 3, 1891; 26 Stat. 1095, 1101-1103, Sec. 24), assumed increased vigor and procured the transfer of the Forest Reserves to the jurisdiction of the Secretary of Agriculture (Act, Feb. 1, 1905; 33 Stat. 628) and later the creation of the Forest Service in that Department (Act March 4, 1911, 36 Stat. 1244). Therefore, after Feb. 1, 1905, all power permits and lines in the National Forests were issued by the Secretary of Agrictulture, and those affecting other public lands, by the Secretary of the Interior.

(b) Departmental Regulations.

Under the power given by all these acts to the Secretaries to issue general regulations for their administration, both Secretaries did so, those issued by the different departments being similar but not identical.

Under the Act of Feb. 15, 1901, the Secretary of the Interior, in 1912 and 1913, promulgated regulations requiring various provisions and undertakings by the Applicant for a power permit. These included a stipulation to pay an annual rental charge based on horsepower per year, to allow inspection of books and records, to maintain an accounting system approved by the Secretary, *to conform to the regulation of rates by State authorities*, to allow recapture of the project by the government, and other conditions all suggestive of later legislation and

From and by means of said 55 kv line between Mill Creek and Leevining Substation, all of the local customers of Power Company in Mono County are served, directly or indirectly, including the Town of Bridgeport, the Town of Leevining, the Garbutt Mine, the Navy, and Mineral County Power System. Power Company sells and delivers electric energy to the Navy at the Mill Creek plant substation or terminal of said 55 kv line, and the energy is metered in said substation, all the facilities of which are owned by Company, except the oil circuit breakers and disconnect switches which belong to Navy [R. 2].

Mono County being a sparsely settled, remote, mountainous area, the entire electric load therein, including energy sold to the Navy and to Mineral County Power System for use in Nevada, amounts to only 3,050 kw (kilowatts) and so is normally carried by one or more of the Mono County Plants of a total 22,600 kw capacity. At times, however, said plants are restricted in generation so that some power flows north out of the Bishop Creek Plants and, formerly, in part, from a plant of the City of Los Angeles on the Owens River pursuant to a contract subsequently terminated.

From Bishop Creek, energy in excess of the comparatively small amount sold in Mono and Inyo Counties, flows south. No energy ever flows from the south into Bishop Creek or into the Northern Division lines, so that only the part of Company's system consisting of plants and lines on and north of Bishop Creek are involved herein.

Contract With Navy.

For some years, the United States, Navy Department, Bureau of Yards and Docks, has maintained and operated, on a Naval Reservation in Mineral County, Nevada, an Ammunition Depot known as "Naval Ammunition Depot, Hawthorne, Nevada," for the storage, packing, shipment, renovation and reworking of explosives, involving various mechanical, technical, and industrial processes and operations simulating a typical industry or factory, and requiring electric energy for motive power, as well as for illumination of the Depot and grounds. Prior to 1943, said power was partly purchased from Mineral County Power System, a publicly owned distributing agency doing business in Mineral County, Nevada, and partly generated by internal combustion engines in Navy's generating station on the Depot Reservation.

During the recent war, in 1943, the increased power requirements of the Depot caused Navy to apply to Power Company for the delivery of energy at Company's Mill Creek Plant, California, into a 55 kv transmission line to be constructed, owned, and operated by Navy from said Mill Creek Plant to the Ammunition Depot in Mineral County, Nevada.

Accordingly, a contract was negotiated for that purpose, and, by reason of certain Presidential Directives, dated September 26 and October 22, 1942, designed to secure economy and fair rates in the purchase of electric energy for the numerous war plants and other installations then being erected by the Government (but having

some of which were adopted into the Federal Water Power Act of 1920. Those Regulations were amended from time to time (see Regulations Aug. 24, 1912, 41 Land Decisions 150, and March 1, 1913, 41 L. D. 532).

Regulation 14(R) of the issue of 1913 is of interest here, as requiring the permittee to stipulate in writing:

> *"To abide by such reasonable regulation of the service to be rendered and to be rendered by the permittee to consumers of power furnished or transmitted by the permittee, and of the prices to be paid therefor as may from time to time be prescribed by the State or any designated agency of the State in which the service is rendered;* Provided: That for the purpose of this paragraph any such regulation shall be deemed to be suspended pending proceedings in the Courts of such State, or in the Supreme Court of the United States on appeal from said State Courts where such proceedings are in the nature of an appeal taken direct from the office. Commission, or board prescribing such regulation to such State Court." (Emphasis supplied.)

In the "Use Book" issued by the Secretary of Agriculture, December 14, 1915, applying particularly to water power, Regulation L-25, page 34, required the permittee to stipulate in writing:

> "To abide by such reasonable regulation of the service rendered and to be rendered by the Grantee, whether in respect to the furnishing or transmitting of power or to the transmitting of communications by telephone or telegraph, and *of rates of payment therefor, as may from time to time be prescribed by the state or by any duly constituted agency of the state in which the service is rendered;* but if such regulation with respect to the furnishing or trans-

no relation to interstate commerce as distinguished from intrastate commerce) FPC, through its representative, Dr. Blalock, participated in the negotiation of the rates to be named in the contract, the matter being numbered W-459 (the "W" apparently standing for "War") in FPC records, and a copy of said contract being retained by FPC in its file W-459. But FPC did not fix or determine or approve or order such rate in the exercise of any jurisdiction under the Federal Power Act, and did not file or require Power Company to file said contract as a rate schedule, nor did the Company ever do so. The contract was not one for the sale of electric energy at wholesale, that is, for resale as defined by Section 201 of the Act, and for that reason, if for no other, was not within the jurisdiction of FPC under the Act.

Said contract between Power Company and Navy was dated July 1, 1943, and provided, among other things, as follows [R. 2, 9, 10-11, 59]:

> "That from and after the first day of July, 1943, *until the end of the fiscal year 1944, and thereafter until sixty (60) days' written notice to the contrary* is given by either party to the other, the Company agrees to furnish to the Government, and the Government agrees to purchase from the Company, all electric energy required by the Government delivered at the Company's Mill Creek (Jordan) Power Plant, located near Lundy Lake, Mono County, California, *for use of the Government's Naval Ammunition Depot, Hawthorne, Nevada*, except such electric energy as may be generated by the Government on such premises * * *." (Emphasis supplied.)

Rate Proceedings Before California Commission.

Within two years after the close of the war in 1945, inflation, with consequent increases in operating costs, necessitated Power Company's application (No. 28791) in October 1947 to California Commission for a general increase of rates throughout the Company's California System [R. 2]. Pursuant to hearings at which Navy was represented, the California Commission, on July 1, 1948, effective August 1, 1948, issued Decision No. 41798 [R. 2, 8] authorizing increases in rates generally throughout Company's California System. Among the schedules of rates fixed by said decision was Schedule P-2 applicable to customers of the same type and kind as the Navy.

Acting in accordance with the mutual option contained in the contract of July 1, 1943, between Power Company and Navy, the Company, as of October 1, 1948, elected to terminate and did terminate said contract by written notice to Navy [R. 2, 9]. There then arose a dispute as to whether said Decision No. 41798 had or had not applied to the Navy contract or to any rate for service to Navy at Mill Creek, California, it appearing that, while said contract had not been expressly mentioned in said decision, it was evident from the evidence and exhibits in said proceeding that all of the calculations of Company's revenues and expenses, made by Company, by the Commission's Staff, and by other interested parties, included revenues and expenses in connection with sales to the Navy, and, particularly, was this true in spreading the

increases in rates among the several classes of consumers on Company's system [R. 8].

In order to settle this dispute, Power Company, on August 8, 1949, filed with California Commission its First Supplemental Application to Application No. 28791, requesting a determination that Schedule P-2 fixed by Decision No. 41798 was applicable to Navy or, if not, that a proper rate for Navy be fixed [R. 2, 6]. A hearing was held on said Supplemental Application October 7, 1949, at which Navy was represented. That hearing was continued to a later date.

Proceedings Before FPC.

Meanwhile, some correspondence between California Commission and FPC resulted in an agreement between the State and Federal Commissions to hold a concurrent hearing on the matter involved in said proceeding before California Commission and on an Order to Show Cause to be issued by FPC. On February 15, 1950, FPC issued and served upon Power Company its Order to Show Cause, which is not in the Record but the nature of which can be judged from the final Order of April 12, 1951 [R. 35-41], since the latter sustained every finding and order proposed by the former.

Following the concurrent hearing, held March 20-21, 1950, that is, before FPC on said Order to Show Cause, and before California Commission on said Supplementary Application in Application No. 28791, the Hearing Examiner for FPC filed his report (initial decision under the Administrative Procedure Act; 5 U. S. C., Sec. 1007) in which he sustained the contentions of Power Company in every respect and recommended the dismissal of the Order to Show Cause.

After considerable delay, FPC, one Commissioner dissenting, on April 13, 1951, issued its Opinion No. 212 and Final Order [R. 24-41], reversing the Hearing Examiner on all points and, among other things, ordering that [R. 41]:

> "(C) California Electric Power Company file the rates and charges as set forth in its agreement introduced in evidence as Exhibit No. 1, dated July 1, 1943, with the United States of America, represented by the Chief of the Bureau of Yards and Docks, Navy Department, as a rate schedule for service to the Navy, such schedule to be effective until and unless schedule is duly superseded by a properly supported new filing or by a rate prescribed by Commission order.
>
> "(D) California Electric Power Company cease and desist from charging Navy any rate other than that duly filed with the Commission."

The FPC Order went to the Court of Appeals for the 9th Circuit on Certiorari pursuant to Power Company's petition filed June 21, 1951, where all points were decided against the Company October 14, 1952. (*California Electric Power Company, a corporation, Petitioner v. Federal Power Commission, Respondent, County of Mineral, State of Nevada, and United States of America, Intervenors*, No. 12,987, ... F. 2d .....) Petition for Certiorari has been filed in this Court, December 11, 1952.

California Commission's Decision No. 45,913.

On July 3, 1951, California Commission issued Decision No. 45,913 [R. 6]. Petition for Writ of Review was filed by Navy with the Supreme Court of California, August 29, 1951 [R. 1] which was dismissed January

21, 1952 [R. 68], and rehearing denied February 18, 1952 [R. 74].

Certiorari was granted by the Supreme Court October 13, 1952.

Summary of Argument.

I.

THIS CASE PRESENTS NO JUSTICIABLE CONTROVERSY, FOR, EVEN IF CALIFORNIA COMMISSION HAD NO JURISDICTION TO ISSUE DECISION 45913, NAVY WAS NOT HARMED THEREBY, NOR WOULD THE REVERSAL OF THAT DECISION BENEFIT NAVY IN ANY WAY.

II.

NEITHER THE ATTORNEY GENERAL, SOLICITOR GENERAL, NAVY DEPARTMENT, NOR COUNSEL THEREFOR HAVE ANY AUTHORITY TO MAINTAIN THIS PROCEEDING OR REVIEW FOR THE PURPOSE OR EFFECT OF TRANSFERRING THE NEGOTIATING AND CONTRACTING AUTONOMY OF THE NAVY DEPARTMENT IN THE PROCUREMENT OF ELECTRIC POWER INTO THE RATE FIXING JURISDICTION OF FPC, AN INDEPENDENT ESTABLISHMENT.

III.

HISTORY AND ANALYSIS OF FEDERAL WATER POWER ACT, ALSO CALLED FEDERAL POWER ACT.

The Act involved in this case was not a new Act in 1935 to which a prior Act of 1920 was attached as a subordinate part, but the Act here involved *is* the Federal Water Power of Act of 1920, textually amended only in minor details and further amended by the addition of Parts II and III relating to regulation of electric utilities engaged in interstate commerce.

(a) The Right of Way Acts, particularly, the Act of Feb. 15, 1901, and (b) Regulations thereunder issued by the Secretaries of Interior and Agriculture in 1913 and 1915 were superseded and to a large extent perpetuated in theory by (c) Federal Water Power Act of 1920. The policy adopted by the Secretaries as early as 1913 and 1915 of requiring licenses of water power sites on the public domain to conform to regulation of rates by the Commission of the state where the service was rendered and the rate charged, or, if state regulation was not available, then to conform to rate regulation by the Secretary, was substantially adopted into (d) Sections 19 and 20, FPC being substituted for the Secretaries, though the three Secretaries of Interior, Agriculture and War constituted FPC until 1930. Said Act of 1920 became Part I of the present Federal Power Act.

(e) Part II of the Act applies only to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale (for resale) in interstate commerce.

(f) Part II did not repeal or displace or qualify Part I, which was enacted under the Public Property clause of the Constitution (Art. IV, Sec. 3, Clause 2) for the purpose of licensing citizens to occupy the public lands for the development of power. Part II was enacted under the Commerce Clause (Art. I, Sec. 8, Clause 3).

(g) Parts I and II are easily reconciled to form a simple and workable method of regulating licensees engaged in interstate commerce as distinguished from non-

licensees engaged in interstate commerce, and, since the decision of this Court in *Idaho Power Company* (*infra*) the two parts must be reconciled, because they are independent and neither qualifies the other.

IV.

SINCE POWER COMPANY IS A LICENSEE UNDER PART I OF THE ACT AND THE STATES CONCERNED ARE NOT UNABLE TO AGREE THROUGH THEIR PROPERLY CONSTITUTED AUTHORITIES, POWER COMPANY'S RATES TO NAVY ARE TO BE REGULATED BY STATE COMMISSION OR COMMISSIONS UNDER SECTIONS 19 AND 20 OF THE ACT.

(a) Petitioner attempts to disqualify Nevada Commission under Section 20 on legal grounds by the claim that Nevada Commission does not have extraterritorial jurisdiction to invade California and regulate the rate which Nevada users should pay for energy at Mill Creek, California. But this attack is rendered futile by the provisions of Section 20, itself, which requires a State Commission to have authority to regulate rates only "within such state."

(b) It is elementary that, where two parts of a statute are alleged to be inconsistent, it is the duty of the Court to reconcile the two parts if reasonably possible, so that both may be effective. Not only can the two parts be reconciled in this case, but they can be so reconciled as to form a simple and workable plan. This is done by simply treating licensees which are engaged in interstate commerce as a class to be regulated under Sections 19 and

20 so long as the conditions thereof exist and are complied with, and having other interstate utilities regulated under Part II.

V.

POWER COMPANY'S RATES TO NAVY ARE NOT SUBJECT TO FEDERAL REGULATION UNDER PART II OF THE ACT.

(a) Company's sales to Navy are not sales in interstate commerce as required by Section 201(b);

(b) Company's sales to Navy are not sales to a "person" as required by Section 201(d);

(c) Company's sales to Navy are not "at wholesale" that is, for resale as required by Section 201(d).

(d) If there is any sale of energy for resale in interstate commerce, it consists of only a minor part of the total, the rest being subject to regulation by California Commission. There is no commingling of energy on Company's system as claimed by Navy, but just the contrary, the delivery is of a uniform quantity of purely California energy, which the Navy disperses to various uses and purposes after it reaches the Ammunition Depot. The case of *Colorado Interstate Gas Co.* (*infra*) is exactly in point, holding that where the customer consumes part of the gas and sells the rest, the delivering company's rates are subject to federal regulation only as to the gas resold.

(e) Company's sales to Navy are merely part of Company's distribution service in Mono County, California, and, as such, are exempt from regulation under Section 201(b).

licensing act to an interstate commerce act, but for *the purpose of supplementing the licensing and special regulatory provisions of Part I applicable to licensees, with provisions for the regulation of those interstate transactions which were not already provided for.* The language of the Act indicates this by the stated purpose "to extend to those matters which are not subject to regulation by the States," (Sec. 201a.) *Licensees were already subject to regulation by the states.*

Part II is based entirely on the Commerce Clause, but Part I, except as to navigable waters, could not be upheld under the Commerce Clause; because, as to many, if not most, projects and licenses, there would be no interstate commerce involved, since, in many instances licensees were engaged only in intrastate commerce and since the majority of streams in the Western States available for power development are non-navigable. Accordingly, in the enactment of the Federal Water Power Act of 1920, later to become Part I of the enlarged Act of 1935, Congress was acting under Article IV, Section 3, Clause 2 of the Constitution giving Congress power "to dispose of, and to make all needful rules and regulations respecting the territory and other property to the United States."

Congress has plenary power to deal with the public domain, and, hence, in disposing of it by sale, lease, license, etc., may attach any conditions it desires. It may subject any resulting intrastate commerce to Federal regulation or it may leave any interstate commerce to local regulation. If both intrastate and interstate commerce result, Congress may subject both to federal or both to State regulation or it may leave both unregulated.

The United States occupies the position of a landlord and the licensee occupies that of a lessee. The lease may

confer rights or impose burdens that could not be enacted under the Commerce Clause alone.

Camfield v. United States, 167 U. S. 518;

Light v. United States, 220 U. S. 523;

United States v. San Francisco, 310 U. S. 16, 29.

So there was no lack of power in Congress to provide that, *as a condition of the license,* the rates of a public service licensee applicable to either intrastate or interstate commerce should be subject to State regulation. Such provision was enacted in a proprietory capacity, not a political capacity, and not under the police power or the Commerce Clause.

But even in Part II of the Act, enacted solely under the Commerce Clause, Congress has left some interstate commerce to state regulation, as it may very properly do and as it has done in many instances and in many areas of commerce.

Connecticut L. & P. Co. v. Fed. Power Com. (*supra*).

In *Minnesota Rate Cases,* 230 U. S. 352, 402, the Court said:

> "Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which, nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence the absence of regulation by Congress in such matters has not imported that there should be no restriction, but that the states

should continue to supply the needed rules until Congress should decide to supersede them * * * In such case, Congress must be the judge of the necessity for federal action."

That rule was followed in *Pennsylvania Gas Co. v. Pub. Serv. Com.*, 252 U. S. 23, which held that, where gas was transported in pipes from Pennsylvania into New York where it was sold and distributed to the public, the New York Commission had authority to regulate the local feature of the interstate commerce, that is, the distribution, as implied merely from the failure of Congress to act. Later, as we know, this principle was affirmatively enacted into Part II (Sec. 201) of Federal Power Act and in the Natural Gas Act, placing the regulation of the local distribution part of interstate commerce in the control of the States, and also sales in interstate commerce for consumption by the purchaser.

Congress has gone further and delegated to the States authority to regulate the entire body of a given kind of interstate commerce.

In *United States v. South-Eastern Underwriters*, 322 U. S. 533, insurance business conducted on a national scale was held to be interstate commerce and subject to the Sherman Antitrust Act. But following the decision of 1944, Congress promptly passed the Act of March 9, 1945 (59 Stat. 33; 15 U. S. C. Secs. 1001-1015), in which Congress delegated the regulation of the whole interstate insurance business to the States, saying:

"1011. Congress declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that the silence on the part of Congress shall not be con-

strued to impose any barrier to the regulation or taxation of such business by the several states.

"1102. The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation and taxation of such business."

The rule deducible from these and many other decisions is that, where a phase of interstate commerce is involved the local importance of which seems to predominate, as in *Pennsylvania Gas Co. v. Pub. Serv. Com.* (*supra*), and Congress has remained silent on the matter, the intent of Congress that state regulation shall function is implied unless and until Congress declares otherwise; but, where the main corpus of the commerce is involved and where the national concern seems to prevail, as in *South-Eastern Underwriters* (*supra*), mere inaction by Congress will not imply an intent that local regulation shall operate and there must be an express delegation of authority to the States.

Where, however, Congress does act and declares that all or any parts of interstate commerce shall be locally regulated, there can be no question of its intent. It is clear, therefore, that no constitutional impediment exists as to the segregation or delegation of regulatory powers between state and federal agencies under either Part I or Part II of the Act.

Public Utility Com. v. Attleboro S. & E. Co., 373 U. S. 83, is sometimes urged as an authority to discredit the power of Congress to delegate to the States regulation of interstate commerce as has been done in Part I of the Act. That decision has no such effect; it was decided in 1927 and was well known to Congress when, in 1935, the

Water Power Act of 1920 was amended and incorporated as Part I of the Act.

The *Attleboro* decision involved electric energy generated by the Seller, Narragansett Electric Lighting Company, in its plant at Providence, Rhode Island, and by it transmitted to the Rhode Island-Massachusetts State line where it was sold and delivered to the Attleboro Steam and Electric Company *for resale to the public in Massachusetts.* There are two reasons why that decision does not apply here:

(1) The Seller's plant was not a project on the public domain licensed under the Water Power Act or otherwise by the federal government, or under any statutory provisions or contractual stipulations imposed by Congress as in Part I of the Act.

(2) There was no act of Congress purporting to delegate to either or both states power to regulate the sale of electric energy for resale in interstate commerce. The whole main body of the commerce was involved as in *South-Eastern Underwriters* (*supra*) so that the mere silence of Congress did not justify the inference that there was any intent to leave the regulation to the States, just contrary to the condition which prevailed in *Pennsylvania Gas Co. v. Pub. Serv. Com.* (*supra*).

Attleboro (*supra*) deals merely with a situation where Congress has failed to act respecting interstate commerce; but no such question is here presented, for Congress has acted very explicitly in both Part I and Part II of the Act and has completely arranged the respective spheres of state and federal regulation. In both Parts, it has left regulation of some interstate commerce to the

States, and in Part I it has contingently provided for federal regulation of some intrastate commerce by FPC.

The differences in regulatory methods in Parts I and II of the Act have occasioned discussion calculated to becloud rather than elucidate Congressional policy expressed clearly enough in the Act. Much of this has been occasioned by failure to appreciate the different histories and different purposes of the two Parts, possibly in looking at the Act more with the eyes of a policy making legislator, rather than simply reading the intent of Congress already fully expressed; and, particularly, in employing modern concepts of expanded federal jurisdiction over interstate commerce to interpret the licensing provisions of Part I, as though that Part were an interstate commerce act, whereas its main subject matter is quite otherwise, interstate commerce coming in merely as an incidental possibility.

A purpose has been manifest to use Part II as a blanket to hide Part I and to obscure the fact that Part I has a function and purpose quite independent of, and quite as important as Part II. There is no indication that the important licensing and regulatory provisions of Part I were to be subordinated by the regulatory provisions of Part II, but the history of the legislation is quite to the contrary.

(g) Reconciliation of Parts I and II.

It is perfectly apparent that, in amending the Water Power Act of 1920 and incorporating it as Part I of the Act, the intent of Congress was to preserve the scheme which had been applicable to licensees for many years, and which was embraced as contractual stipulations in

> mitting of power is *not exercised by the state*, or by any duly constituted agency thereof, that the Secretary may upon the filing with him of formal complaint by the State, by a municipality, or by not less than twenty-five (25) customers or prospective customers of the Grantee, cause an inquiry to be made concerning the service or rate of payment complained of; and if it shall appear upon such inquiry that the service or the rate of payment complained of is unreasonable, the *Secretary may fix the character of the service and may name the rate of payment* which shall be rendered or charged." (Emphasis supplied.)

Here, we discern the pattern of the Water Power Act of 1920 beginning to take form. Both Secretaries required the permittee's rates to be *regulated by the State where the service was rendered*, and the Secretary of Agriculture provided that, if those functions were not performed by the State, *the Secretary of Agriculture would regulate the rates and service*, thus assuming essentially the same position as he later occupied as a member of FPC.

It is to be observed that these regulations made no distinction between the regulation by the State or by the Secretary of either intrastate or interstate commerce. Regardless of whether the permittee was engaged in intrastate or interstate commerce or partly one and partly the other, the State was to regulate in the first instance and, upon its failure, the Secretary was to perform the function. The legal justification for this, as later pointed out herein, was that the Right of Way Acts and the regulations thereunder were not bottomed on the Commerce Clause, but on Article IV., Section 3, Clause 2, of the Constitution, giving Congress plenary power over the public lands. Hence, in disposing of public lands by

sale, lease or permit, Congress could attach any conditions it saw fit, without invoking any powers under, or observing any limitations imposed by the Commerce Clause.

(c) Water Power Act of 1920.

The defects in the Right of Way Act of 1901, particularly, the indefinite tenure accorded the permittee soon became apparent to those interested in the conservation and development of natural resources, so that by 1914 it was generally realized that the law was inadequate for the promotion of the national interests. In that year, H. R. 14893 was introduced under the sponsorship of the Secretary of the Interior for the purpose of making more orderly, complete and dependable provisions for granting electric power rights. That bill did not pass, so that in 1917, President Wilson requested the Secretaries of Interior, Agriculture, and War, the last named presumably by reason of his interest in navigable waters, to prepare a bill on the subject, which the President could recommend to Congress. That was done and, though that bill failed to pass the 65th Congress, it was passed later practically unaltered, becoming the Federal Water Power Act approved June 10, 1920 (41 Stat. 1063).

The three Secretaries having participated in drafting the legislation, and in fact having been made *ex-officio* the members of the first 3-member Federal Power Commission in 1920, the Water Power Act naturally reflected ideas and policies which had grown up in the Departments. This was particularly true with respect to Sections 19 and 20, providing for the regulation of rates and services of those licensees which were public utilities. These sections preserved the basic idea of regulation which

had developed in the Departmental regulations, viz., *that the rates of all public service licensees were to be regulated in the first instance by the Commission of the State where the service was rendered, and, in the absence of such State Commission, by FPC.*

(d) Sections 19 and 20.

Sections 19 and 20 have not been amended since their original enactment in 1920, but were later incorporated intact in the enlarged Federal Water Power Act or Federal Power Act of 1935.

Section 19 provides that, *as a condition of the license,* every licensee which is a public service corporation (some are not) shall abide by such reasonable regulation of its services and rates as may be prescribed by the *duly constituted agency of the State in which the service is rendered or the rate charged,* but, if such state regulation is not provided, then jurisdiction is conferred on FPC, *until such time as the State shall have provided an authority for such regulation,* and the jurisdiction of FPC shall cease so soon as the State provides such regulatory commission.

Section 20, which has likewise been incorporated in Part I of the Act of 1935 without amendment, provides, that, if said power or any part thereof shall enter into interstate commerce, the rates charged shall be reasonable, non-discriminatory, and just to the customer, and that whenever *any state directly concerned* has not provided a commission or other authority to enforce said requirements *within such state, or such states are unable to agree,* jurisdiction is conferred on FPC to regulate so much of the rates and charges as may pertain to interstate commerce.

Two peculiarities are to be observed:

First: Section 19 does not apply solely to power generated in licensed projects or "project power" or even to power which contains an admixture of project power; it applies to all rates for all power sold by the licensee, even though generated in unlicensed plants. The scheme, therefore, seems intended to require of the license a general standard of conduct as to all its rates and not merely as to project power.

Secondly: Regulation under Sections 19 and 20 does not depend upon whether intrastate or interstate commerce is present, for, under various conditions, either or both may be regulated by State or Federal commissions. This is possible for the reason, later explained, that those provisions were enacted under the Public Property Clause, not the Commerce Clause of the Constitution.

By virtue of Section 6 of the Act, the provisions of Sections 19 and 20 are incorporated into each license and become contractual rights and obligations.

(A copy of the Rate Regulation Provisions which appear in all of Power Company's licenses is printed in the Appendix hereto.)

These licensees, usually issued for 50 years for the occupancy of public lands or navigable waters for power development, are not gratuities, but are in the nature of leases containing mutual terms and conditions binding on the United States and the licensee and, particularly, obligating the licensee for substantial charges and duties.

Under Section 10, the project must be designed to fit the comprehensive development of the waterway; no alteration in or voluntary transfer of the property can be made without approval of FPC; after the first twenty

years of operation, amortization reserves must be set up by the licensee which, in the discretion of FPC, shall be held until the termination of the license or used in reduction of net investment; the licensee must pay annual charges covering the cost of administering the Act and the rental value of government land occupied; if the licensed project is benefited by later work of the government or a later licensee, compensation must be paid therefor; and the licensee must convey to the United States land and rights of way necessary for the construction of navigation facilities, and furnish free power for the operation thereof.

One of the prominent concessions exacted by the United States from the licensee is that provided by Section 14 for the recapture of the project at the end of the term of the license. This is to be at "net investment," that is, the actual legitimate original cost, which, by reason of the inevitable inflation and loss in purchasing power of the dollar that goes on gradually but persistently all the time, decade after decade, is sure to be much less than the fair value, market value or cash value, or reconstruction value in money at some future date of recapture. Since 50 years will usually elapse between the original investment and the recapture, the payment will be made by the United States in dollars that will have lost much of their purchasing power.

The history of the present Federal Power Act, therefore, shows that Part I of the Act is, with amendments not material here, the Federal Water Power Act of 1920, which in turn embodies practices of the Departments of Interior and Agriculture which dated back to 1913 and 1915, particularly, with reference to the provisions of Sections 19 and 20. Therefore, in 1935, when the

present Act was adopted, there had been upwards of 20 years of experience with these provisions and FPC, itself, had been issuing licenses for 15 years under these same provisions. There can be no doubt that all concerned joined in approval of the general scheme of allowing all rates of licensees to be regulated by the State Commission or Commissions, if such were provided, otherwise by FPC.

(e) Part II of the Act.

Part II of the Act was enacted pursuant to the Commerce Clause, but it does not exhaust the powers of Congress over interstate commerce. In the first place, it does not displace certain regulation of interstate commerce by the States as provided for in Sections 19 and 20 and, in the second place, it does not apply to certain admittedly interstate sales which are exempted by various provisions and definitions of the Act.

Part II applies to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale (for resale) in interstate commerce; but it does not apply to sales (a) in intrastate commerce; (b) in local distribution; and (c) in interstate commerce, not for resale, but for consumption by the purchaser or the transmitter.

Connecticut L. & P. Co. v. Fed. Power Com., 324 U. S. 515, 525.

The same is true of the cognate provisions of the Natural Gas Act.

Panhandle Eastern Pipe Line Co. v. Pub. Serv. Com., 332 U. S. 507;

Fed. Power Com. v. Panhandle Eastern Pipe Line Co., 337 U. S. 498, 502;

Panhandle Eastern Pipe Line Co. v. Fed. Power Com., 341 U. S. 329.

A second peculiarity of Part II is that the application of its various sections is not uniform. While the ownership or operation of facilities for the transmission of electric energy in interstate commerce or for the sale of electric energy for resale in interstate commerce, constitutes the owner a "public utility" (Sec. 201) and subjects the owner to the provisions of Section 203, requiring authority from FPC to sell, mortgage, lease or dispose of facilities subject to FPC jurisdiction and having a value in excess of $50,000; and subjects the utility to Section 204, requiring approval of FPC for the issue of most kinds of securities; and subjects the utility to various accounting and reporting requirements of Part III; those facts do not subject the utility to any rate regulation under Sections 205 or 206 unless it is selling such energy for resale in interstate commerce and, if it is, then only those particular rates are subject to FPC regulation.

In the Matter of Wisconsin-Michigan Power Co., Docket E-6268, June 1, 1951, FPC said:

> "A 'public utility' may or may not be subject to regulation under a particular section of Part II depending on whether the Section by its terms applies. Thus, under Section 205 of Part II, it is only those wholesale sales of a 'public utility' that are in interstate commerce which are subject to the Commission's jurisdiction. For that reason, notwithstanding our finding that Wisconsin Company is a 'public utility' we must next examine in this opinion the Com-

pany's operations as they relate to the wholesale sales to determine whether they are in interstate commerce, and, therefore, subject to our jurisdiction under Sections 20, 205 and 206 of the Act."

Applying this rule to Power Company, it means that the fact that the Company is a utility by reason of the transmission of electric energy over its own transmission line from Hoover Dam into California and from California into Nye and Esmeralda Counties, Nevada, has no bearing on whether or not the Company's rates to Navy or Mineral County are subject to FPC jurisdiction under Part II.

(f) Relation Between, and Constitutional Bases of Parts I and II of the Act.

Much, if not most, of what has been said by lower Federal Courts about the relative import of Parts I and II of the Act, their relation to each other and the possible inconsistency between them was rendered obsolete by the decision of this Court in *Fed. Power Com. v. Idaho Power Co.*, ... U. S. ....., 73 S. Ct. 85, decided Nov. 10, 1952. The basis for that briefly worded decision will, we believe, be more apparent if we repeat here substantially what we have contended from the beginning of the present litigation.

Parts I and II of the Act are not inconsistent though different, for they deal with different subject matters, and are based on different constitutional authority.

Part I is the primary and principal part of the Act which is the *Federal Water Power Act of 1920*, as amended. The Amendments consist mainly of the additions of Parts II and III, made, not for the purpose of repealing Part I or of changing the whole act from a

many licenses then still outstanding. We need not inquire whether this was deemed necessary in order not to impair the obligations of the contracts or whether it was still considered best even if a new policy were open for adoption. The fact that it was done is sufficient. Congress knows that new licenses are still being applied for and issued under these same provisions and stipulations and, yet, there is no evidence of any intent to alter or terminate them.

In any event, the result is that licensees, in consideration of the several contractual obligations assumed under Part I of the Act, occupy a different status from other persons and corporations engaged in interstate commerce and coming under the rate regulation provisions of Sections 201, 205 and 206 of Part II of the Act, but having no contractual relations with the United States. There is no inconsistency, no inadequacy, and no incongruity in this simple segregation, though its very simplicity seems to have been used to cast doubt upon it.

The supposed conflict, more apparent than real, between regulation under Sections 19 and 20 and under various provisions of Part II of the Act has been considered by several Courts in a number of cases. Some courts have gone to extremes to read complications into the Act, and it has been often suggested, though seldom held, that Part II repealed by implication portions of Part I.

The briefs and contentions of FPC in the several cases which have involved these matters leave no doubt that it does not look with favor upon Sections 19 and 20, and it invariably seeks to emphasize Part II by reversing what ordinarily would be the logical and natural order of discussing the two main parts of the Act. FPC follows the

practice of first discussing Sections 201, 205 and 206 and, then, referring to Sections 19 and 20, if at all, in a minor key as if they had in some way faded out and disappeared.

FPC's strategy has seemed to be rather quietly to ignore Sections 19 and 20 or to merge them into Sections 201, 205, and 206, so as to lose their identity.

Their psychological approach is this: first, to argue that Part II applies to the case, and, next, to ask what there is in Part I to the contrary, thus giving the impression that Part II is the main and basic part of the Act and casting the burden upon the opponents to show that Part I in some way repeals or displaces Part II. They ought, on the contrary, to proceed first to ascertain whether the facts bring the case under Part I, which is the original and basic part of the Act, and, next, to ascertain what there is in Part II which repeals or displaces Sections 19 and 20 of Part I.

So far as we have been able to observe, *FPC has never argued before any court that Part II repealed by implication any portion of Part I.* We believe they have not even suggested it. Undoubtedly, the reason is that FPC is looking to the time when the government may want to recapture projects at the expiration of the licenses, and anticipates that it might be met with the claim that the Government had breached the licenses by legislative rescission of license terms.

In the following cases it was held that Part II of the Act did not repeal any portion of Part I:

> *Safe Harbor W. P. Corp. v. Fed. Power Com.*, 124 F. 2d 800 (C. A. 3) (herein referred to as *First Safe Harbor*);

Safe Harbor W. P. Corp. v. Fed. Power Com., 179 F. 2d 179 (C. A. 3) (herein referred to as *Second Safe Harbor*);

Alabama Power Co. v. Fed. Power Com., 128 F. 2d 280, 293 (D. C. Cir.), cert. den. 317 U. S. 652;

Niagara Falls Power Co. v. Fed. Power Com., 137 F. 2d 787, 795 (C. A. 2), cert den. 320 U. S. 792.

But, in *Pennsylvania W. & P. Co. v. Fed. Power Com.*, 193 F. 2d 230, 239 (D. C. Cir.), the Court squarely held that Part II repealed Part I so far as the latter was intended to confer jurisdiction on State Commissions to regulate interstate wholesale rates. This was somewhat weakened, if not rendered dictum, by the fact that the Court also found that the Maryland and Pennsylvania Commissions were unable to agree, thus, under the language of Section 20, casting the jurisdiction on FPC, regardless of any implied repeal.

When the last cited case went to the Supreme Court (*Pennsylvania W. & P. Co. v. Fed. Power Com.*, ... U. S. ....., 72 S. Ct. 843), the Statute received somewhat different treatment, for this Court upheld regulation under Part II, without indicating what had become of Sections 19 and 20. This Court said simply that Part II was "a more expansive federal regulation," and that it would "hinder, not help, the Power Act's program if we should impliedly exempt Part I licensees from the more expansive Part II regulation."

In view of the facts in that case, it seems that this language referred to a comparison between (a) Federal regulation under Part II and (b) Federal regulation under

Part I, and not to a comparison between (a) Federal Regulation under Part II and (c) *State* regulation under Part I, for the latter couple being of different nature could hardly be compared, or at least one could not be judicially proved better than the other.

At this point, it is necessary to observe that there are two different areas of dispute as to the application of Parts I and II to the regulation of licensees, and that failure to observe this difference may have led to misunderstanding.

First, there is, as in the case at bar and as in *First Safe Harbor* (*supra*), the initial problem as to whether State or Federal commissions have jurisdiction. If State commission or commissions have jurisdiction, FPC does not. But, if State regulation is absent or fails as provided in Sections 19 and 20, FPC has jurisdiction to the exclusion of the States.

Secondly, where FPC has taken jurisdiction in the absence or failure of State regulation under Sections 19 and 20, there is then the question whether FPC shall follow the procedure and technique provided in Part I (for example, Sec. 3(13) defining "net investment" and "actual legitimate original cost") or whether it may follow its general methods applicable to non-licensee interstate utilities under Sections 205, 206 and other sections of Part II. This question was presented in *Second Safe Harbor* (*supra*) and in *Pennsylvania W. & P. Co. v. Fed. Power Com.* (*supra*), but has not been raised in the case at bar and is not here ripe for decision. In the two cases last cited, the States of Pennsylvania and Maryland were found unable to agree, the same identical evidence being involved in both, that is, the letter written by Maryland Commission asking FPC to fix the rates.

It may very well be that, after FPC has once acquired jurisdiction under the express provisions of Sections 19 or 20, it is entitled to follow the same methods of regulation which it would use as to a non-licensee coming under Part II, and, in that respect, it might be said that it would be advisable, or preferable or promote the regulatory program for FPC to use its Part II procedure. This, therefore, was undoubtedly what the Court meant in *Pennsylvania W. & P. Co. v. Fed. Power Com.* (*supra*), for it would obviously be improper for this Court, in deciding a matter of statutory jurisdiction between State and Federal agencies, to give any consideration to what the Court might deem better, more helpful, or more satisfactory, such being a political, not a justiciable comparison.

The inability of the two states to agree having been found, this Court obviously did not intend, by omitting express reference to that crucial finding, to imply that FPC would have jurisdiction regardless of that finding, for in that case, FPC's jurisdiction would not attach under Sections 19 or 20, and it could not have jurisdiction under Part II unless that Part repealed Part I, which this Court has denied in *Fed. Power Com. v. Idaho Power Co.* (*supra*).

Moreover, this Court could not, by omitting reference to the States' inability to agree, give the decision or opinion a broader effect any more than it could do so by assuming facts not in the record. We take it that a judicial opinion is authority only with reference to the facts of record, and that, so far as it exceeds or disregards those facts, it is *obiter dictum*.

Therefore, all that *Pennsylvania W. & P. Co. v. Fed. Power Com.* (*supra*) established is that, where FPC jurisdiction has attached by reason of the failure of States to agree, FPC may apply, in addition to procedure under Part I, the more expansive procedure under Part II. That is a question of the *Second* class above described and is not involved in the case at bar.

This Court made the very significant statement that:

> "It may be possible that some future cases will develop minor inconsistencies in the administration of the two Parts. Today's case, however, is not such a one."

It appears that the case at bar is such a case, for here there is no finding or evidence that any State Commissions are unable to agree. The only other case that we know of that has involved this situation uncomplicated by other issues is *First Safe Harbor* (*supra*) in which the order of FPC purporting to regulate Safe Harbor's rates was set aside for the reason that that Company, a licensee engaged in the transmission and wholesale of energy in interstate commerce, was subject to regulation solely by State Commissions, under Section 20, there being no evidence that they were unable to agree.

The different result in *Second Safe Harbor* (*supra*) was due solely to the finding of the Court that the Pennsylvania and Maryland Commissions were unable to agree, and the same finding *on the same evidence* was made in *Pennsylvania W. & P. Co. v. Fed. Power Com.* (*supra*).

For the reasons we have stated, the decision of neither this Court nor the Court of Appeals in *Pennsylvania W. & P. Co. v. Fed. Power Com.* (*supra*), appear to be determinative of the issues in the case at bar.

But in *Fed. Power Com. v. Idaho Power Co.* (*supra*), this Court laid down fundamental principles which, for the first time, seem to afford the basis upon which all issues can be settled in the common sense way in which Congress undoubtedly intended.

By that decision, it is finally established that there was no implied repeal of Part I by Part II; that each of the two Parts performs a separate function and arises out of different constitutional powers and has different objectives. That opinion announces in concise language essentially what Power Company has contended in proceedings before FPC and California Commission; what the Hearing Examiner for FPC concluded and recommended; what California Commission wrote into Decision 45913; and what the Company contended before the Court of Appeals for the 9th Circuit in the companion case No. 495, this term.

In *Idaho Power Co.* (*supra*), this Court said:

> "Part I and Part II provide different regulatory schemes. Part II is an exercise of the commerce power over public utilities engaged in the interstate transmission and sale of electric energy. * * * Part II does not undertake to regulate public lands or the use of navigable streams. That function is covered by Part I which dates back to the Federal Water Power Act of 1920, 41 Stat. 1063. Section 4(e) of Part I gives the Commission power to issue licenses to private and public bodies for the purpose of 'constructing, operating and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other works'. * * *.
>
> "It is difficult for us to read Sec. 201(f) as in any way affecting that power. Sections 201(f) and

202 deal with interconnections of facilities generally. They do not extend the new powers granted by Part II to government lines. On the other hand they do not purport to change or alter any power granted under Part I. They do not deal with the grant of licenses. They do not purport to lay down conditions for the issuance of licenses for use of the public domain. We therefore cannot construe the limitation on the new powers conferred by Part II as a repeal by implication of the powers over licensees that are deeply engrained in Part I of the Act and put there by the Congress for the purpose of protecting the public domain."

While *Idaho Power Company* (*supra*) did not involve regulation of rates, it did involve the possibility of interference by Part II provisions with the licensing provisions of Part I. Since the rate regulating provisions of Sections 19 and 20 are part and parcel of the licensing and conservation program of Congress set forth in Part I for power developments on the public lands, and are made contractual provisions of the licenses, they cannot, any more than any other part of that program, be subjected to interference from the provisions of Part II of the Act.

As we read the Act and the legislative history of the Act, particularly, of the additions of 1935, it was quite as much the policy of Congress to preserve the long-established and functioning regulatory machinery of the States as it was to set up the new federal regulation. Stated in another way, Parts II and III would not have been adopted had they contemplated interference with so elaborate and widespread an establishment as that consisting of the many State regulatory Commissions.

In considering the value placed by Congress on existing State regulatory establishments and its readiness to turn over to their care the regulation of some interstate commerce, it is helpful to observe that the interposition of a federal agency into a well ordered and functioning State regulatory pattern may be attended by awkward and unprofitable results. For example, in the present case, we would have FPC, a federal agency with headquarters some 3,000 miles away, injected as the sole arbiter of Power Company's rate to Navy (and one other customer involved in a companion case) the total demands of both not exceeding 2,500 or 3,000 kilowatts on Company's system with a peak load of over 200,000 kilowatts, and serving over 50,000 other customers located throughout eastern and southeastern California.

When California Commission regulates all those rates, it has a single undivided California public utility system before it, with one rate base, one set of revenues and expenses, and one body of consumers divided into several well recognized classes. It has but one fair return to find and one amount of revenue to provide that fair return, which revenue flows from one set of rate schedules apportioning the burdens of cost among different classes of service. It gives equal treatment to those similarly situated. In this case the P-2 schedule used for Navy was exactly the same rate as was paid by industrial consumers throughout Company's system.

But see what happens if FPC comes in to regulate the rates to Navy or even to one or more other consumers

like the Navy. Such special consumers are not served from separate plants and lines, but receive a part of a reservoir of power generated in many plants and dispatched over many lines. The amount of property or rate base which is devoted to that special service and the amount of the various items of expense incurred in supplying that service all have to be arrived at by allocation or estimation. That is complicated by the fact that electric rates are not "flat" as so many cents or mills per kilowatt hour, but are assessed on various sliding scales and load factor and power factor characteristics of the customer's business. In short, there is no completely mathematical method of apportioning to a 2,000 kilowatt customer using, say, 8,000,000 kilowatt hours per year, the exact amount of property out of a whole system producing, say, 200,000 kilowatts and 1,000,000,000 kilowatt hours per year. Nor is there any way of mathematically determining how much of many kinds of expenses should be allocated to such special customer.

The consequence is that, at critical stages throughout the computation, mathematical quantities must give way to estimates, allocations, judgment, taste, whim, prejudice, or arbitrary will. Hence, in the case supposed of California Commission regulating all of Company's rates, except those for two consumers, and FPC regulating those two, neither Commission is compelled to allow for what the other Commission will do or has done. They need not follow the same methods, probably will not. The results of the two rates do not have to add up to

100% of what either Commission would find for the system as a whole, though each Commission is sure to speculate as to what the other will do.

These consequences, if legally required, are unavoidable, but they are wasteful, inefficient, awkward, unsatisfactory and decidedly expensive, and ought not to be adopted unless clearly required by the Act, which they are not.

In answer to the above, our opponents may say that it is certainly equally bad to have two State Commissions regulating an interstate rate under Section 20 as to have one federal commission do so under either Section 20 or Part II. But this is not true. The scheme of regulation contemplated by the Departments as early as 1913 and 1915, written into the Federal Water Power Act in 1920 and continued in that act in 1935 and unamended now for over 30 years, is simple and workable. In the normal course of events, the procedure would be as follows:

The Commission of the State where the project is located and the energy is generated (say California) would regulate the rates of the licensee "within such state" and the rates so fixed would be charged at the plant or at the State line for energy moving in interstate commerce. Presumably those rates would be reasonable, nondiscriminatory, and just, because the Commission of the delivering State could not fix a higher rate for the interstate service than it does for the intrastate service, without disclosing discrimination and inducing the Commission

of the receiving state immediately to announce its disagreement, thereby *throwing the regulation into the hands of FPC under Section 20.*

The Commission of the delivering state would not overcharge its own citizens in order merely to overcharge interstate consumers. Hence, the interstate rate would not exceed the intrastate rate and the latter would, of course, be as fair and just as the Commission knew how to make it. With rates thus fixed by the State of origin, the process would normally be concluded under Section 20. No approval or other action by the receiving state or states would be called for. Only in the event the Commission of a receiving state found unfair discrimination against it, need it protest, and, if that protest were not satisfied or withdrawn, then, it could be said that the two Commissions were unable to agree, and the *jurisdiction would vest in FPC under Section 20.*

While it is possible under very unusual circumstances or with very large interstate commerce involved that the interstate compact clause of the Constitution (Art. I, Sec. 10, Clause 3) might be resorted to, as suggested by the Court in *First Safe Harbor,* such is not necessary. *Section 20 does not require that the states meet, confer, consult, or agree upon any topic.* It provides merely what is to occur if they are *unable to agree,* and, until one or both disclose their inability to agree, FPC has no jurisdiction under Section 20.

IV.

Since Power Company Is a Licensee Under Part I of the Act and the States Concerned Are Not Unable to Agree Through Their Properly Constituted Authorities, Power Company's Rates to Navy Are to Be Regulated by State Commission or Commissions Under Sections 19 and 20 of the Act.

Company is a licensee under Part I of the Act [R. 1]. Whether intrastate or interstate commerce is involved is immaterial under this branch of the argument, for, in either event, the State (California) in which the service is rendered and the rate charged, has authorized and empowered a Commission (Respondent herein) to regulate the same as provided in Sections 19 and 20 of the Act, and the States directly concerned (California and Nevada) have provided Commissions to enforce the provisions of Section 20 of the Act.

> Public Utilities Act of California (Stat. 1915, p. 115, as amended; Deering Gen. L., Act 6386);
>
> Public Service Commission Act of Nevada (Stats. 1919, p. 198, as amended; Nev. Comp. L. 1929, Secs. 6100 *et seq.*).

Neither does it seem material under this heading to draw a distinction between the operation of Sections 19 and 20 or to decide whether or not Nevada is a State concerned, because the case has been tried and argued throughout as involving only the choice between State and Federal regulatory jurisdiction, and not as involving any question as to whether one or two States should participate.

(a) Attempted Disqualification of of Nevada Commission.

Petitioner apparently regards the disqualification of Nevada Commission under Section 20 as a height which must be taken and held to gain the victory, for it resorts to the bizarre contention that Nevada Commission does not fulfill the requirements of Section 20, because Nevada Public Service Commission Act does not confer the extraterritorial jurisdiction to invade the State of California, figuratively at least, and regulate the rate at which consumers in Nevada may *purchase* power in California or to enter into agreements with the commissions of other states for the fixing of interstate rates.

This contention has nothing to commend it, except novelty. It is completely negatived by the language of the Act. Section 19 refers only to *"an agency of the State in which the service is rendered or the rate charged,"* which here means California. Section 20 requires only a "Commission or other authority to enforce the requirements of this section *within such state.*" Nevada Commission fully answers that description, without being expressly authorized to operate extraterritorially in California or elsewhere.

Petitioner cites Maryland Public Service Commission Law, Section 348, and Pennsylvania Public Utility Law, Section 913(a), to show that States do authorize their Commissions to make joint investigations with other State or federal Commissions, but those statutes were adopted in 1927 and 1937, respectively, long after Federal Water Power Act was adopted in 1920, and so Congress, in referring to State Commissions in Sections 19 and 20 of the Act, did not have any such State Statutes in mind.

Petitioner's contention is also remarkable in that, *in this very case, FPC held a concurrent hearing with California Commission which has no express statutory authority to participate therein.* FPC seemed to sense no disqualification of California Commission on that account. Moreover, FPC Annual Reports, at least ever since 1940, have contained a section listing cooperative proceedings and joint hearings held by FPC and State Commissions, many of which had no statutory authority to participate therein, and, among others, the present case is referred to in the Annual Report for 1950, page 137.

Obviously, no state can of its own authority operate extraterritorially so as to affect the rights of any person outside of that state. For the Nevada Commission to regulate the price at which a Nevada consumer might *buy* electric energy in California, if it had any effect at all, would be to fix the price at which a California utility might *sell* energy. Section 20 contemplates only the ordinary type of State Commissions each operating *"within such state,"* and it does not require that any State Commission operate without that state; nor enter into any agreement with the Commission of any other state, unless it be that failure to protest or object would be considered a tacit agreement. Section 20 speaks of what happens only if the state commissions are unable to agree. As above stated, the normal process would consist of the ordinary rate fixing procedure by the Commission of the delivering state. If that rate be not protested by the receiving state, nothing further happens; the situation is stable and satisfactory. It is only in the event that the receiving state protests or announces its disapproval, followed by no satisfactory adjustment, that the two states

can be said to be unable to agree, thus, calling for federal regulation under Section 20.

Not only can Congress not be supposed to have had in mind a State Commission which purported to operate with extraterritorial effect, but it can not be deemed to have had in contemplation one which fixed the price at which utilities under its jurisdiction might *purchase* energy, either within or without the state.

Neither the Federal Power Act nor state regulatory laws generally attempt to confer power to regulate prices at which utilities may *purchase* electric energy. The reason is plain. There is no more cause for a Commission to fix the price at which a utility can purchase electric energy than there is to regulate the purchase prices of coal, oil, materials, supplies, labor, salaries and many other items that enter into the cost of production or operation, many of them much larger than the cost of purchased power. Since the prices or wages which a utility could pay would necessarily fix the price at which the general public might sell, if they were to sell at all to the utility, a public service commission would eventually become a price and wage fixing agency of considerable magnitude.

Hence, all rate regulation applies to electric energy, gas or other commodities sold.

This point is illustrative of much of the discussion that has been indulged not only by FPC but by the Courts, wherein strange and sometimes almost alchemical mysticism has been written purportedly to ascertain the "intent of Congress" but in language and with results that few if any Congressmen would understand, for example; *Hartford E. L. Co. v. FPC.*, 131 F. 2d 953, certiorari

when this act was adopted, Congress had no idea that the Navy would be engaged in transmitting energy across a state line or anywhere or at all and had no thought that any definition of interstate commerce would be applied to the Navy or any agency of the United States.

Thirdly, if the Navy's transmission of electric energy is not interstate commerce under the Constitution, Congress could not make it interstate commerce by statute. Otherwise Congress could declare anything at all interstate commerce for the purpose of regulating it. Of course, Congress would not need to declare any act of Navy to be interstate commerce in order to regulate or govern Navy, for it already has that power. To apply Section 201(c) to Navy, rather extreme assumption would have to be indulged that Congress envisaged not only that Navy would be engaged in the transmission of electric energy but that it would purchase such energy in one state and transmit it into another, all to the end that Congress might regulate the company from which the energy was purchased. The possibility of any such combination was too remote and the objectives to be gained too speculative to justify the assumption that Congress had any such purpose.

As above stated, the only pretext upon which Power Company is attempted to be implicated in interstate commerce in this case is on the theory that the Navy is engaged in interstate commerce in electric energy, and that the Company, in participating in that operation by delivering energy to the Navy, is likewise engaged in interstate commerce. But since the Navy is not conducting any interstate commerce, it follows that the Company is not.

Even the Court of Appeals for the Ninth Circuit, in *California Electric Power Company v. Fed. Power Com.*,

..... F. 2d ....., No. 12,987, decided October 14, 1952, missed our point when the same argument was presented there, saying;

> "Nor is it of consequence, as the petitioner contends, that in one instance the energy is transmitted across the state line by the United States. Federal Power Commission vs. Arizona Edison Co., *supra*, p. 681. *The question is not whether the United States is engaged in interstate commerce, but whether the petitioner is.*" (Emphasis added.)

This seems to constitute an inferential admission that the United States (Navy) is not engaged in interstate commerce, but completely misses the necessary conclusion that neither is the Company, for there is no interstate commerce involved at all. The position of the Ninth Circuit would seem to have no logic or reason behind it. The meaning would be this: The Company and Navy are engaged in a combined operation, the only part of which could cause the joint operation to be interstate commerce being the part conducted by Navy, but Navy's part does not constitute interstate commerce, though the Company's part does! Evidently that court confused the idea of the Navy's *not being engaged in interstate commerce* with the idea of its *being engaged in interstate commerce but being immune from regulation.* In the former case, there being no interstate commerce, neither Company nor Navy would be engaged therein; in the latter case there would be interstate commerce and the mere exemption of Navy from regulation would not excuse Company.

The point seems never to have been critically examined by the Ninth Circuit, for, in *California Electric Power Co. v. Fed. Power Com.*, *supra*, that Court followed, without comment *Fed. Power Com. v. Arizona Edison Co.*, 194 F.

2d 679, where the opinion that government transmission of power across a state line was interstate commerce was expressed in a single short sentence and a footnote, based upon no precedent or expressed reasoning.

As we read *Powell v. U. S. Cartridge Co.*, 339 U. S. 497, cited by Petitioner, it was decided on the theory that the mere fact that the manufactured products were consumed for war purposes and not for trade and barter, did not remove their shipment from interstate commerce. But that is not quite this case. Here, there is more than mere consumption by the Navy, for the Navy purchases, takes, and transmits the energy, as well as it consumes it. The Company claims that, from the instant of its generation, it is in the possession of the government and everything that is done with it which could be interstate commerce if done by a private person is done by the government, so that, the whole transaction is the performance of a national constitutional function which is neither commerce nor interstate. In *Powell v. U. S. Cartridge Co., supra*, the private employer not only manufactured but shipped the goods by common carriers. In the case at bar, the Company merely manufactures the enrgy and the government takes and transmits it over its own lines.

The actual situation is that, when Company delivers electric energy to Navy at Mill Creek, California, such energy passes out of the purview of Part II as any kind of commerce and becomes a part of the supplies of the Navy for national defense. *The very act of delivery to Navy which Petitioner claims puts the energy into interstate commerce is, in fact and in law, the act which removes it completely and irrevocably from any possibility of being either interstate commerce or commerce at all.*

(b) Company's Sales to Navy Are Not Sales to a "Person" as Required by Sec. 201(d).

Section 201(d) provides:

> "'The term 'sale of electric energy at wholesale' when used in this Part means a sale of electric energy to any *person* for resale." (Emphasis added.)

Section 3 of the Act defines certain terms "for the purpose of this Act," that is, the whole Act, Part I, II and III. Paragraphs (3) and (4) of that section define "person," to mean an individual, private corporation, partnership, association or other private organized group.

Therefore the United States, the Navy and other governmental agencies are not "persons" which can be be engaged in resale within the meaning of the Act.

This has been so well expressed by the General Counsel for FPC in a brief, filed in August, 1951, in *United States ex rel. Chapman v. Fed. Power Com. and Virginia E. & P. Co.*, Nos. 6273 and 6274 in the United States Court of Appeals for the 4th Circuit, that we quote and adopt his language.

> "'Person' is limited in Sec. 3(4) to mean 'an individual or a corporation.' This alternative definition excludes the United States. For the United States is clearly neither a corporation nor an individual.
>
> "Usage of the word 'person' elsewhere in the Act confirms this definition. As used throughout the Act, the word 'person' cannot include the United States. If it did, absurd or impossible situations would arise: the licensing provisions of the Act would apply to the Army Engineers, Bureau of Reclamation, T. V. A. and other agencies of the Federal Government; provisions of Part II of the Act relating to rates and service in interstate commerce would

apply to the Secretary of the Interior, T. V. A., and other Federal agencies; and the Commission could sue to enjoin the United States under Sec. 314(a), ask for the issuance of writs of mandamus against the United States under Sec. 314 (b), and request penalty fines against the United States under Sec. 316.

"Furthermore, there would then be no reason for having included Sec. 303 in the Act in order to make 'agencies of the United States' engaged in the sale of power subject to the provisions of Sections 301 and 302, so far as may be practicable. For those latter sections by their terms apply to every 'licensee,' and the agencies of the United States would be 'persons' requiring a license under Sec. 23(b)—'licensees.'

"Finally, it is significant that Sec. 3(13), in describing excluded donations, list of funds obtained from 'States, municipalities, individuals, *or others.*' The word 'others' has been interpreted by the Commission to include the United States, the word being looked upon as a catch-all. No word which could be considered a catch-all was used in Sec. 313(a) though Congress, as Sec. 3(13) shows, could have used such a word had it desired to do so.

"In the course of its passage through Congress, Sec. 313, which originally was drafted to give 'any person' the right to rehearing and review, was amended by adding 'State, municipality or State Commission.' This change made plain congressional recognition and intention that 'person' should not include governments, and that only State and municipal governmental units should be accorded rehearing and review.

"Sec. 313 as enacted was derived from S. 1725, 74th Cong., 1st Sess. The May 4, 1935, Confidential Print of S. 1725 shows, by underscoring the

words italicized below, the additional language added in the Senate Committee:

"Sec. 309(a). Any person, *State, municipality or State commission* aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, *State municipality or State Commission* is a party may apply for a rehearing within thirty days after the issuance of such order * * *

"From this action, it is abundantly clear that the Committee considered that 'person' as used in the bill, bore a restricted meaning. And to give the precise coverage in the section which they desired, they added the words 'State, municipality or State commission', to 'person.' If the Committee had thought that 'person' included the United States, there would have been no necessity for making the change. For if 'person' then included the United States, it necessarily included also the lesser governmental units, States, municipalities and State commissions.

"Further, it is clear that when the Committee added 'State, municipality or State commission' they gave the right to ask for a rehearing only to those governmental units which they considered should have that right. If the Committee members had desired that the United States have such a right, it would have been a simple matter for them to have included the United States. This the Committee did not do."

Petitioner admits that, according to the literal meaning of Section 201(d), Petitioner is not a "person" to whom energy can be sold for resale under the Act. But, basing its hope on such cases as *United States v. American Trucking Assn.*, 310 U. S. 534, Petitioner urges this Court to disregard the words "to any person" in Section 201(d), because, it is further asserted, these words crept in with an amendment to the Act and through an indavertence or

denied, 319 U. S. 741, but its reasoning disapproved in *Connecticut L. & P. Co. v. FPC* (*supra*); see also the *Second Safe Harbor Case* (*supra*).

It must be clear that Congress, in writing Sections 19 and 20, did not visualize novel or unusual or unheard of types of state regulatory commissions but only those of the common variety with which members of Congress were familiar in their home states.

(b) Reconciliation of Parts I and II of the Act.

No meritorious objection to the regulation of Power Company's rates by State Commission or Commissions under Sections 19 and 20 of Part I has been raised, except the assertion that, in some unspecified way, the jurisdiction has devolved upon FPC. Those sections are obviously not repealed by Part II. Hence, they must be considered and not merely ignored.

The rule is too well known to require citation of authority that, when two parts of a statute are seemingly in conflict, it is the duty of the Court to reconcile and make both parts work if reasonably possible. It is easily possible to do so. The rule does not mean that the court must be satisfied with the substance of the result as though the court were acting legislatively, but it means a reconciliation that is reasonable, practical, and workable which effectuates two seemingly but not really inconsistent intents of the legislature.

Any one can imagine that the amndments of 1935 to the Federal Water Power Act of 1920 might never have

been passed. Any one can imagine that, under those circumstances, regulation of Licensees' rates would have proceeded about as we have outlined, that is, the rates for both intrastate and interstate energy would have been fixed by the generating State. As to the interstate portion, no other procedure would have been necessary, unless or until the receiving state objected and failed to have its objection satisfied, whereupon, it would announce the failure to agree, and FPC would succeed to the jurisdiction.

Now, to reconcile, we have only to allow that system to continue, applying Part II to interstate utilities other then Licensees and possibly to Licensees if and when FPC has acquired jurisdiction of them under Sections 19 or 20.

Nobody has pointed out any meritorious objection to that reconciliation. It appears to reflect the intent of Congress, for it is settled that Congress intended Part I and Part II each to remain fully effective. While FPC has made it evident that it does not like that solution, the preferences of that body are not binding on the courts, and must be suspected of having some self interest or pride of office implicit in them.

Since Decision 45913 of the California Commission complies with the requirements of Sections 19 and 20 of the Act, and the present state of the record leaves jurisdiction in that Commission as against FPC, the Petition herein should be dismissed.

V.

Power Company's Rates to Navy Are Not Subject to Federal Regulation Under Part II of the Act.

Irrespective of the application of Sections 19 and 20 of the Act, the provisions of Part II, particularly Sections 201, 205, and 206, do not by their language or intent apply to Company's sales to Navy. This does not mean that such businesses must go unregulated. California Commission has always considered it a part of the operations of Company's California system and subject to regulation as other rates for distribution of electric energy in California.

The history of the legislation shows that Congress appreciated the existence of a well established and efficiently functioning system of utility regulation in practically all of the states, and did not desire to interfere with or disrupt that establishment. Indeed, this principle was written into the Act (Sec. 201(a)) where it is said that federal regulation is "to extend only to those matters which are not subject to regulation by the states." This principle was recognized by this Court and the reasons explained in *Connecticut L. & P. Co. v. Fed. Power Com.* (*supra*), at pages 525-530. It was there said that, while not the sole guide to the interpretation of the Act, it cannot be ignored and some consideration must be given to it. But it is to be feared that some have construed this to require only a nod of recognition in passing, without any appreciable effect on final conclusions.

Large classes of interstate commerce are omitted from the federal regulatory provisions of Part II and left to state and local regulation. Some of those omissions result from the language of Section 201, which states what

facilities and operations are to be included, and other omissions result from definitions. Some of these definitions are found in Part II applicable only to Part II and some are found in Section 3 of Part I applicable to the whole Act, Parts I, II, and III.

The classes of interstate commerce which are exempted from regulation under Part II are:

(1) Facilities and sales in local distribution are excluded by Section 201(b) even though electric energy imported from another state may be involved, which, as explained in *Connecticut L. & P. Co. v. Fed. Power Com.* (*supra*), constitutes typical interstate commerce down to the light bulbs or burner tips.

(2) Transmission or sale in interstate commerce where the energy is not resold by the purchaser but is consumed by the transmitter or by the purchaser is excluded by the provisions of Section 201(b). In order to effect federal regulation, there must be a two-step sale, that is, a sale to, and a resale by the purchaser.

(3) Transmission or sale in interstate commerce where the sales are made to governmental or public agencies or corporations, is excluded by definition in Section 201(d), where "sale of electric energy at wholesale" is defined to mean "sale of electric energy *to any person* for resale," and by Sections 3(3) and (4), defining "person" to mean a private individual, corporation, joint stock company, partnership, association, business, trust, organized group of persons, receiver or trustee.

Power Company's sales to Navy are not "sales at wholesale in interstate commerce" subject to Part II because—

(a) They are not sales in interstate commerce, the Navy not being engaged in interstate commerce either constitutionally or under the definition in Section 201(c);

(b) They are not sales to a person as provided in Section 201(d);

(c) They are not sales for resale;

(d) If there is a resale of energy, it involves only a minor part of the total, the rest being unquestionably subject to regulation by California Commission;

(e) Company's sales to Navy are merely part of Company's distribution service in Mono County, California, and as such are exempt from regulation under Part II.

Those points will be discussed separately.

(a) Company's Deliveries and Sales to Navy Are Not in Interstate Commerce.

Our position on this point has, at times, been misunderstood or misconstrued, for, if its true import is once recognized the whole interstate foundation for federal regulation of Company's dealings with Navy vanishes.

It is well established and thoroughly understood that a Company is engaged in interstate commerce if its facilities and operations participate in that commerce, even though they be located or occur wholly within a single state. Hence, the mere fact that the energy delivered by Power Company to Navy at Mill Creek, California, does not leave California on a line of the Company is immaterial. No point is made of that fact.

The crucial fact is, however, that the energy involved herein is generated in California and is purely intrastate and remains intrastate energy unless sale to, or the transmission thereof by Navy into Nevada makes it interstate. The further crucial fact is that the customer here, whom

for brevity we call Navy, is the United States, itself, acting through the Navy Department.

The maintenance and operation of the Naval Ammunition Depot, Hawthorne, Nevada, is a constitutional function provided for by Article I, Section 8, Clause 1 of the Constitution giving Congress power "to provide for the common defense," and Clause 13 of the same section, giving Congress power "to provide and maintain a Navy."

There is no provision in the Constitution giving Congress or the United States power to engage in interstate commerce. No one has supposed that the operations of the United States in carrying on national functions constituted interstate commerce or commerce at all. The United States, in the exercise of its constitutional functions, operates in the country as a whole, entirely oblivious of state lines and without any restrictions by reason of state lines. The idea that the United States or its armed forces, in defending or preparing to defend the country, are engaged in commerce, intrastate or interstate, is novel and incongruous. It would mean that the Navy, in sending recruits from various states to a Naval training station on Lake Michigan, or by flying an airplane from Washington to Key West, or dispatching a battleship from New York to San Francisco, would be engaged in interstate commerce, and, if such battleship were then dispatched to fire projectiles into Red Korea, that would be foreign commerce. Indeed it could, on that theory, be said that the Supreme Court, itself, is engaged in interstate commerce, because the Justices are assigned to and

occasionally make official visits to the Circuits or the Court publishes its opinions and decisions for interstate distribution, thus, coming under the same rule as newspapers and magazines.

> "Commerce among the states means commerce between individual citizens of different states."
>
> *Trade Mark Cases,* 100 U. S. 82, 96.
>
> "Interstate commerce is trading and trafficking in commodities between and amongst citizens of different states."
>
> *Wabash Co. v. Illinois,* 118 U. S. 557.

So unusual is the suggestion that the Navy, Army, Air Force or other national defense or other national functions constitute commerce or interstate commerce that there is very little judicial authority directly in point.

In *Georgia Power Co. v. T. V. A.,* 14 Fed. Supp. 673 (D. C. N. D., Ga.), the Court said at page 676:

> "There has been some argument that interstate transmission of electricity is interstate commerce, but its local distribution is domestic commerce, but I think the matter immaterial. The Federal Power over interstate commerce is to regulate it, not to engage in it. T. V. A. gets no help from that source. Its activities in selling electric power as pointed out in *Aswander, et al. v. Tennessee Valley Authority;* 56 S. Ct. 466, 80 L. Ed.—rest on the constitutional right of the United States to dispose of their property. That decision settles that electric energy generated at Wilson Dam and not needed for government purpose may be sold under authority of Congress, and that to effect sales transmission lines may be bought or built to a market for it; and this was held although

evidently the contemplated sale was not a transient or casual one, but a continuous operation amounting to a business."

In *Ashwander v. T. V. A.*, 297 U. S. 288, 330, 339, the constitutionality of T. V. A. operations was upheld solely on the authority of Article IV, Section 3 of the Constitution giving Congress power to dispose of property belonging to the United States.

To this apparent truth, answer will probably be made that, even if the transmission of electric energy by Navy is ordinarily neither interstate commerce nor commerce at all, it is made both by Section 201(c) of the Act which provides that "electric energy shall be held to be transmitted in interstate commerce if transmitted from a state and consumed at any point outside thereof."

But this definition cannot be deemed to apply to activities of the United States for three reasons: First, because statutes are deemed not to include the government unless it is especially mentioned.

United States v. Wittek, 337 U. S. 346;

United States v. United Mine Workers, 330 U. S. 258;

United States v. Cooper Corp., 312 U. S. 600.

Secondly, because Section 201(f) states that

"No provision of this Part shall apply to or be deemed to include, the United States, a state or any political subdivision of a state, or any agency, authority, or instrumentality of any one or more of the foregoing," etc.

Hence the definition of interstate commerce does not apply to the United States or Navy. It is obvious that,

A rule of reason should be applied in utility law as well as other fields. If Navy's contention here be adopted by the Court, then, it follows that each and every industrial consumer can transform his business into the resale of electric energy by simply charging the night watchman 50 cents per month to light his guard house, for we are told that, in view of *Jersey Central P. & L. Co. v. Fed. Power Com.*, 319 U. S. 61, there is no rule of *de minimis* under the Act. If that be so, the sale of one kilowatt hour for 3 cents would produce all the consequences that would flow from the sale of billions of kilowatt hours for millions of dollars.

Of course, it is possible to say that the Quartermaster General of an armed service is a retail grocer, butcher, baker, tailor, druggist, etc., because he handles and distributes practically everything that is dealt in by the merchants of any City, yet Courts must be practical enough not to be imposed upon by metaphysical arguments, and, here, the Court ought to have no difficulty in finding that an industry's supply of electric service to its employees and others who are on the industry premises solely for the promotion of the industry's occupation is not resale in the public service which Congress had in mind.

(d) If There Is Resale of Energy, It Involves Only a Minor Part of the Total, the Rest Being Unquestionably Subject to Regulation by California Commission.

It is not even claimed by Navy or FPC that all of the energy delivered by Company to Navy at Mill Creek is delivered or used by Navy's employees and others on the Depot premises, but it was found by FPC [R. 37] that the amount "resold" during the years 1943-48 ranged

from 15.4% to 28.6%, the average being 18.7%, though, in 1949, it was 24%.

Hence, assuming that these amounts, varying from 15.4% to 28.6% were "sold for resale" as mentioned in Section 201(d) of the Act, only those amounts would come within the regulatory powers of FPC as "the sale of electric energy at wholesale in interstate commerce." The remaining 71.4% to 84.6% would be "other sale of electric energy" to which Part II of the Act does not apply.

To meet this apparent defect, Navy and FPC have asserted that, although only an average of 18.7% of the total energy is even claimed to be resold, yet, this part is "commingled" or "inextricably commingled" with or "indistinguishable" from the major part of the energy which is admitted to be consumed by Navy.

But this is a complete misrepresentation of the conditions. There is no commingling of two kinds, classes, or supplies of energy, but just the contrary. There is a sale to Navy of only one uniform supply, which, however, Navy, for its own purposes, divides and dispatches to several different places and uses on the Depot Reservation, among which are its employees' houses. So far from being a commingling, this is a dispersion, and, since Navy is solely responsible for this dispersion and has complete control over it, Navy cannot hide behind any such assertion that it operates so as to prevent any one from detecting what it does with the different parts.

The theory of "inextricable commingling" is based on the idea that particles of electric energy or kilowatt hours cannot be distinguished or identified, one from the other, so that, if quantities of energy from different sources get

into a single line, they can never be separated. Presumably, then, one who, in addition to his own electric energy, get possession of some one else's energy in the same line would own the whole, for the other claimant would have no way of identifying his own kilowatt hours, even though it were admitted that he owned some in the mixture. The same theory would be applicable to water in a reservoir, irrigation ditch, or pipe line, and to oil in tanks, grain in elevators, and all kinds of fungible goods. This theory would set back electrical practice, irrigation practice, and many commercial practices by at least 50 years, and some much longer. The practice of measuring into a line, ditch, reservoir, tank, elevator, etc., two or more supplies of electric energy, water, oil, grain or other fungible goods is too well established to permit any such quibbling.

It appears from *Idaho Power Company v. Fed. Power Com.*, 189 F. 2d 665 (C. A. D. C.), and the decision of this Court on certiorari, Nov. 10, 1952, *Fed. Power Com. v. Idaho Power Co.* (*supra*), that FPC, itself, with later approval by this Court, issued a license under Part I of Federal Power Act for a transmission line, with a provision requiring the license, Idaho Power Company, to receive and transmit over that line, along with that Company's own energy, energy supplied by the government. Is it contemplated that having got the government's power into its line, Idaho Power Company will be able to retain the whole power supply, because the government will be unable to identify and repossess the particles or kilowatt hours of energy which it fed into the line?

Navy seeks to answer this argument by citing several cases, none of which are in point. Those cases involve just the opposite factual situation from the case at bar.

They would be applicable if Power Company generated some energy in California and purchased some generated by Navy in Nevada and then sold this commingled supply in California.

All of the cases cited by Navy involved situations of that kind, where the utility had on its system, mixed and constantly varying supplies of intrastate and interstate energy which were delivered to various customers in various places, at various times, and in varying amounts, no effort being made by the utility (as would probably have been impossible) to ascertain from time to time, how much of each kind of energy was delivered to the many customers respectively.

We may take *Pennsylvania W. & P. Co. v. FPC*, ... U. S. ....., 72 S. Ct. 843, as the latest case and as typical of all cases cited on this point by Navy. Speaking of Penn Water's contention that its sales in Pennsylvania to Pennsylvania consumers were not in interstate commerce, the Court said (p. 846):

> "(2) It is contended that some of Penn Water's sales at wholesale were not 'in interstate commerce' and therefore were not subject to federal regulation under Part II. This contention refers to sales made by Penn Water in Pennsylvania to Pennsylvania customers. These are alleged to constitute about 83% of Penn Water's total business. Because of the following circumstances we agree with the Commission and the Court of Appeals that these sales were 'in interstate commerce.'
>
> "Penn Water and Safe Harbor Water Power Corporation (Safe Harbor) have hydrogenerating plants on the Susquehanna River in Pennsylvania. Consolidated operates large steam-generating plants

in Baltimore. The flow of the Susquehanna varies greatly even from day to day. During periods of low flow, Penn Water receives steam-generated energy from Baltimore in order to met its power supply commitments. Conversely, during periods of high flow, consolidated is able to receive the cheaper hydro-power from Penn Water and Safe Harbor. For many years Penn Water, Consolidated, and Safe Harbor have been operating under contracts for the coordinated sale and distribution of electric power in Maryland and Pennsylvania. A complete integration and pooling of the power producing and transmitting facilities of the three companies was thus achieved. With reference to this coordinated system of production and distribution, the Commission said:

"'The central fact disclosed by the record about Penn Water's sales in Pennsylvania is that they are not sales of the output of Penn Water's own plant, but sales of output of the integrated and coordinated interstate electric system of which Penn Water's facilities are an integral part. * * *

"'In this manner energy crossing the State boundary, with other system energy, is used to fulfill system requirements. There results times when system energy generated in Pennsylvania is used, mixed or unmixed, in meeting system requirements in Maryland. Similarly, there are occasions when system energy from Maryland is used, mixed or unmixed, in meeting system requirements in Pennsylvania. Energy flows in, across and out of the system transmission network as the needs of the interconnected members develop from minute to minute and day to day.

"'It is accordingly evident that the operations of the unified system enterprise are completely interstate in character, notwithstanding the fact that system energy transactions at some particular times may in-

volve energy never crossing the State boundary.' 8 F.P.C. 1, 12, 15.

"We hold that the Federal Power Commission has complete authority to regulate all of this commingled power flow. The Commission's power does not vary with the rise and fall of the Susquehanna River."

In the case at bar, however, Power Company has no commingled energy on its system. It is all purely California energy unmixed with any other until it reaches the place of use by customer, the Navy, at the Ammunition Depot, where the Navy parcels it out partly for the operation of machinery, partly for lighting the grounds, partly for the service of employees required to be on the Depot premises for the operation thereof, and partly for various other uses of the Depot.

The case at bar is precisely like *Colorado Interstate Gas Co. v. Fed. Power Com.*, 185 F. 2d 357 (C. A. 3). There Colorado Interstate sold gas to Public Service Company, a local distributing public utility, and also to the City of Colorado Springs, which operated a municipal distribution system. Both customers, however, not only sold and distributed the purchased gas to the public, but consumed gas for the operation of boilers for the generation of electric energy. Consequently, under Section 1(b) of the Natural Gas Act (15 U. S. C. 717(b), identical in effect with Section 201(b) of Federal Power Act), and the decisions in *Panhandle Eastern Pipe Line Co. v. Public Serv. Com.* (*supra*), and other cases, the portion of the gas sold by Colorado Interstate to the two customers which was resold by these customers to the public was subject to FPC regulation, while the portions consumed

"quirk of draftsmanship utterly unintended." It offers no proof of this; indeed its case seems to depend on the absence of any evidence and to gain whatever force it has from the fact that the legislative history is silent on the point of how, why or by whom the critical words were added.

Respondent Power Company fully appreciates the length to which such cases as *American Trucking Assn.* have gone, but believes this Court has never yet done anything so extreme as Petitioner asks it to do here. In that case, the Court, after declaring that

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes," (p. 543),

passes by the necessity for disregarding words which produce "absurd or futile results" and comes to the field where the present case is supposed to rest, that is, where

> "* * * the plain meaning did not produce absurd results, but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' * * *" (p. 543),

and concludes that

> "*A few words of general connotation* appearing in the text of Statutes should not be given a wide meaning *contrary to a settled policy*, 'excepting as a different purpose is plainly shown,'" (Emphasis added); (p. 544).

The question there was whether the Motor Carrier Act which authorized Interstate Commerce Commission to prescribe "maximum hours of service of employees,"

applied to all employees or only those who operated motor vehicles. The former, said the Court (p. 544), would bring a result "quite distinct from the *settled practice* of Congress," which "has been consistent in legislating for such regulation of transportation employees in matters of movement and safety only." (Citing three such acts of Congress and referring to similar acts in forty states) (p. 545).

Finally, the Court said (p. 545) that the word "employee" was not a word of art and concluded that only those operating motor vehicles on the highways were included under the Act.

There are several clear distinctions between such cases as *American Trucking Assn.* and the case at bar.

(1) Here the word "person" is a word of art, precisely defined and precisely used, and not merely one of "general connotation." Throughout the Act, the word "person," sometimes with another word qualifying or adding to it, is employed repeatedly and with fine distinction. In addition to its appearance in Section 201(d), the word "person" is used no less than 12 times to include only natural persons, firms, private corporations and the like, to-wit: in Sections 201(e), 202(b), 202(d), 202(e), 304(b), 305(b), 307(c), 307(g), 314(a), 314(b), 316(a), 316(b). Without words of qualification, it is never used to indicate anything but private individuals, corporations and other private interests. In at least 6 places, where there was a purpose to include both private interests and governmental or public bodies or corporations, there were used, in addition to "person," such words as "State," "municipality," "State Commission," etc., to-wit: in Sections 3(13), 23(b), 303, 306, 309(a), 313(a).

(2) The application of Section 201(d) according to its literal meaning does not conflict with any "practice of Congress" and is not inconsistent with any other legislation.

(3) The literal application of Section 201(d) presents no absurd or even unreasonable or unworkable results, nor does it involve any dispute of jurisdiction between FPC and any other federal regulatory agency as in *American Trucking Assn.*

(4) The claim that administrative construction has been contrary to the literal meaning of Section 201(d) and should have weight is without merit, because the first case in which FPC held that it had jurisdiction of rates to municipalities for resale purposes was *Otter Tail Power Co.* (2 FPC 134, 137, 33 PUR NS 257, 260), decided as late as 1940 and not contested for the reason that Otter Tail Power Company requested FPC to take jurisdiction over such rates. The only contested cases were:

Connecticut Light & Power Co., 3 FPC 132 (after 1940);

In the Matter of Wisconsin-Michigan Power Co., FPC Docket E-6268, June 1, 1951;

In the Matter of Interstate L. & P. Co. and Wisconsin P. & L. Co., Docket E-6252, Opinion 215, July 12, 1951.

Certainly that brief and recent experience does not constitute administrative construction.

In *Pacific P. & L. Co. v. Fed. Power Com.* (C. A. D. C.), 184 F. 2d 272, it was held that even though FPC had, over a period of 20 years, issued hundreds of licenses for minor transmission lines purportedly under authority

of Section 4(e) of the Act, and even though such licenses were still outstanding, such did not constitute an administrative construction of Section 4(e); and, hence, such minor lines not being "projects" were not within the licensing jurisdiction of FPC.

Petitioner cites *City of Los Angeles v. The Nevada-California Electric Corp.*, 2 FPC 104, 32 PUR NS 193, as of the same type as *Otter Tail Power Co.* (*supra*) and as holding that sales to a municipality for resale are sales to a "person." But that case is cited in error, for no sales at all were involved therein, and, hence, there was no opportunity for any application of the definition of "wholesale" as "sale to a person." In that case, the Company had contracted to transmit power for the City of Los Angeles from Hoover Dam to Los Angeles for a consideration. The power consisted solely of that allocated to the City by the United States at said Dam and belonged to the City from the instant of its generation, the Company at no time having any interest therein. The transaction came under the jurisdiction of FPC as a "transmission of electric energy in interstate commerce" as provided in Section 201(b) and not as a "sale of electric energy at wholesale."

(5) There is no patent defect in Section 201(d) as there is, for example, in the next to last line of Section 205(c) of the Act, where "regulate" is clearly an erroneous substitution for "relate." Nor is there anything incongruous or awkward, or inconvenient, or unworkable about Section 201(d). Its only fault is that certain influential people do not like it. They say it is contrary to the main purpose of the statute, but how do they prove that? The only evidence as to the purpose of the statute

with respect to regulation of sales to governmental bodies and public corporations for resale is set forth in Section 201(d), itself, reinforced by Sections 201(e) and 201(f).

The fact that Section 201(d) exempts a certain class of interstate commerce in electric energy does not make it inconsistent with the rest of the Act, for it is admitted that two other classes of interstate commerce are omitted by Section 201(b): (i) distribution of electric energy, even that which has moved in interstate commerce, and (ii) transmission or sales of energy in interstate commerce where the energy is not resold, but is consumed by the transmitter or the purchaser. The consequence, therefore, of one or the other construction of Section 201(d) is merely to include more or less interstate commerce under the Act or to exempt less or more. Neither is inconsistent with the rest of the Act, the only question is: where did Congress draw the line between federally regulated and unregulated sales.

This Court itself has said in *American Trucking Assn.:*

> "Obviously, there is danger that the Courts' conclusion as to legislation purposes will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body."

Petitioner cites other cases which fall within familiar rules of construction but not closely in point here, for example, *Lawson v. Suwanee S. S. Co.*, 336 U. S. 198, where the literal definition in the statute produced obvious incongruities and absurd results, and *Ohio v. Helvering*, 292 U. S. 360, where the statutory definition, it-

self, invited exceptions and indicated that it was not of universal application, thus:

> "Where not otherwise distinctly expressed or *manifestly incompatible with the intent hereof*, the word 'person,' as used in this title, shall be construed to mean and include a partnership, association, company or corporation, as well as a natural person." (Emphasis supplied.)

Petitioner here assumes a desperate and dangerous position. A desperate position in that it asks this Court to take one short phrase in Section 201(d) reading—

> "a sale of energy to any *person* for *resale*"

and to twist "person" one way and "resale" the other, that is, to place such a liberal construction on the former as to eliminate it, and such a strict construction on the latter as to include internal transactions between the Navy and its officers, personnel and employees operating the Ammunition Depot, such as accounting for electric energy used in habitations maintained on the Reservation, treating such internal transactions as typical utility resales to the public in public service.

Petitioner's contention is dangerous, for it could equally well be applied to practically any statute which is extensively amended on its course through Congress.

It would virtually establish a rule that, *where a bill is amended on its way through the legislature, no critical words inserted by an amendment will be given effect by the Courts unless the amendment is accompanied by a Committee or Conference Report showing the intent to insert such words and the purpose thereof.*

Any statutory language could be disregarded which the judges do not *now* think reflects what ought to have been the Congressional intent a decade or two ago, or which does not express what it would have expressed if the Court had been the legislature.

It can hardly be shown that Congress did not know what it was doing when it used "person" in Section 201(d), because the same word appeared with the same limited meaning in the very next paragraph, 201(e), and both were followed by 201(f) which confirmed and reinforced them by declaring that *no provision (which of course included the definitions in (d) and (e) just above) of Part II should apply to the United States, a State, etc., etc.*

Lengthy hearings and debates were held on the Act and such experts as Commissioner Seavey of FPC and Mr. Dozier A. DeVane, Solicitor for FPC, were in attendance, testifying, watching, and assisting in passing the legislation. (Senate Hearings on S. 1725, Apr. 16-29, 1935, 74th Congress, pp. 223, 224, 232-257; House Hearings on H. R. 5423, 74th Congress, 1st Session, Feb. 19, 1935, pp. 384-559.)

It is significant that Section 201(d) has remained undisturbed for 17 years and, if it contained such glaring misprision, such egregious blunder as now alleged so as adversely to affect the United States, the forty-eight states, and several thousand municipalities and governmental agencies, certainly FPC would have asked Congress to correct the error. That it did nothing of the kind indicates that it had no hope of success from that source, but preferred to accomplish the purpose by its own decisions and those which it could persuade the Courts to make.

May we not suggest that, in view of the fact that the Congressional avenue is still open, it would be inappropriate for this Court to take such unprecedented liberties with legislation functions as it is now asked to do.

(c) Company's Sales to Navy Are Not "at Wholesale," That Is, for Resale.

Navy makes the colorable but insubstantial claim that, because it assesses, along with rent for houses and quarters, a small charge for lighting and other electric service to Naval Officers and Naval and civilian personnel and others who are living or doing business on the Depot reservation for the maintenance and operation thereof, and who would not be there otherwise, it is engaged in the resale of electric energy with the same effect as if it were a public utility selling energy in public service.

Service to Navy began with the Contract of July 1, 1943, which was negotiated between Company and Navy, with the intervention of FPC. It provided for the sale and delivery by the Company at Mill Creek, California, of electric energy "for use of the Government's Naval Ammunition Depot, Hawthorne, Nevada."

Naturally the Navy, the Company, and FPC knew that the operation of the Depot did then, and would continue to require the presence of Naval Officers, Naval personnel, armed guards, civilian operating employees and others, many, if not most of whom would have to dwell on the Depot premises as in the case of any military post or base. It was obvious that all these persons would receive electric service in their dwellings and quarters just as they would need water, telephones, garbage disposal and other services customary in such cases.

Whether or not the charge for electric service were separately stated on monthly bills or regarded as a separate charge is immaterial, for, if houses and quarters were rented with electricity furnished, the cost of that service would be inevitably included in the rent. The cost would be there and the value would be there and, if there were a sale where a separate charge was specified, there was equally a sale where the charge was included in the rent.

But none of the parties, at the time the contract was negotiated or for seven years thereafter, considered that the service of employees and others on the Depot premises for the maintenance and operation thereof, was a sale or resale of electricity but all of them considered it "for use of the Naval Ammunition Depot" and so expressed the purpose in the contract.

Now, when Navy presented its complaint to FPC resulting in the Order to Show Cause of February 15, 1950 [R. 3], it was obvious that FPC had no jurisditcion thereof unless Company's sale to Navy was a "sale for resale." In said Order to Show Cause, for the first time, the service to Navy was alleged to be sale for resale, and then obviously as an afterthought and make-weight to give FPC jurisdiction.

Indicative of the good faith of the Company is the fact that, after California Commission's Decision 41798 of July 1, 1948 [R. 2] prescribing Schedules P-2 and P-3 naming higher rates than previously charged, Company began to charge Navy under Schedule P-2 applicable to industrial consumption, though at the same time it applied Schedule P-3 (quoting somewhat higher rates than P-2 and applicable to sales for resale) to a neighboring customer, Mineral County Power System, which was ad-

mittedly engaged in resale of energy to the public of Mineral County [R. 6].

Mineral County, Nevada, like Mono County, California, is desert, mountainous and sparsely settled. The town of Hawthorne is an old settlement, but small and entirely inadequate to accommodate such influx of civilian workmen as were imported to work at the Ammunition Depot during the last war. In addition to quarters usually provided for Naval officers and Naval personnel at such bases or posts, Navy was forced to construct a housing project on the Reservation to provide quarters for workmen at minimum rentals, and, for obvious social reasons, supply stores, businesses, and recreation facilities, such as a moving picture theatre, had to be provided. All this was a part of, and necessary for the fulfillment of the purposes of the Depot, otherwise, Navy would not have allowed civilians on the premises or provided any accommodations for them.

Navy's claim that the supply of necessary dwelling services at minimum or token charge (electricity 1½ cents per kilowatt hour) constitutes the business of reselling electric energy, is hypercritical if not quibbling. These persons were cut off from the general public by the necessity for maintaining military discipline and security. They had to be and were subject to summary ejectment from house and Depot by Order of the Commanding Officer.

The regulation of the rate charged by Company to Navy has no appreciable effect on any charge for electricity made by Navy to its employees, because any charge made by Navy is merely a matter of internal accounting routine and the election rests entirely with Navy whether it makes a high charge, a low charge, or no charge at all.